No. 47292-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MERIDIAN PLACE, LLC,
a Washington limited liability company,

Respondent,

v.

HUMCOR, INC., a Washington corporation,
d/b/a Callaway Fitness, *et al.*,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JOHN HICKMAN

BRIEF OF RESPONDENT

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I. INTRODUCTION

In its original decision, the trial court entered unchallenged findings that the debtor's president and shareholder, appellant John Haughney, orchestrated the transfer of the debtor's only valuable asset – the Callaway I health club – to a third party to avoid the valid claim of the debtor's landlord, respondent Meridian Place, LLC. On Meridian's appeal of the trial court's limited award of damages for what was indisputably a fraudulent conveyance, this Court reversed as inadequate the trial court's $75,000 damages award and remanded with instructions to enter judgment in favor of Meridian for the value of Callaway I at the time of the transfer.[1] Obeying this Court's mandate, the trial court on remand entered judgment for the undisputed value of Callaway I – $750,000 less the cash amount paid by the transferee to obtain the asset free and clear of a lender's security interest.

The trial court correctly rejected Haughney's contention that Meridian's damages for this fraudulent conveyance were equal to Callaway I's value less the face amount of the lender's lien rather than the amount actually paid to transfer clear title in the fraudulent

[1] *Meridian Place, LLC v. Haughney*, 176 Wn. App. 1006, 2013 WL 4501449 (2013) (*See* CP 152-67, Appendix A)

transfer of Callaway I. The trial court's discretionary assessment of damages on remand complies not only with this Court's mandate, but with the letter and purpose of Washington's Uniform Fraudulent Transfer Act, which authorizes a creditor to recover "the value of the asset at the time of the transfer" from "the person for whose benefit the transfer was made." RCW 19.40.081(b)(1), (c). This Court should affirm and award Meridian its fees for responding to a frivolous appeal, filed solely for purposes of delay. RAP 18.9.

II. RESTATEMENT OF ISSUE RELATED TO ASSIGNMENTS OF ERROR

The Uniform Fraudulent Transfer Act provides that a creditor who has been victimized by a fraudulent transfer "may recover judgment for the value of the asset transferred . . ." RCW 19.40.081(c).

Where a debtor and its principal agree to, and then in fact, transfer to a third party the debtor's property free and clear of a lender's security interest in order to avoid the claim of creditor, is the creditor entitled to recover judgment under RCW 19.40.081 against the principal for the value of the asset transferred less the amount actually paid to the debtor's lender to release its security interest?

III. RESTATEMENT OF THE CASE

The following restatement of the case is taken from the trial court's original Findings of Fact and Conclusions of Law (CP 555-62), this Court's unpublished decision in *Meridian Place. LLC v. Haughney*, 176 Wn. App. 1006, 2013 WL 4501449 (2013) (CP 154-67) (App. A), the trial court's unchallenged Supplemental Findings of Fact and Conclusions of Law (CP 396-99) (App. B), its Memorandum Decision (CP 364-68) (App. C), and where necessary to support the trial court's challenged findings and conclusions, the evidence before the trial court on remand. Haughney's brief violates RAP 10.3(a), as he does not cite to the evidentiary record before the trial court, instead relying on his legal memorandum rather than any affidavits, documentary evidence or trial testimony to support his assignments of error.[2]

A. Haughney orchestrated the transfer of Callaway I, Humcor's sole valuable asset, to prevent Meridian from recovering on its claim for delinquent rent.

Appellant John Haughney was a 42% shareholder and president of Humcor, Inc., the corporate owner of a successful health

[2] For example, Haughney cites repeatedly to his post-remand "Motion for Declaratory Judgment" regarding damages (CP 307-18) to support many of his factual contentions that lack evidentiary support. (App. Br. 4-5, 11)

club known as Callaway Fitness (Callaway I). (FF 2, 4, CP 556)[3] In June 2006, Humcor opened a second fitness center, known as Callaway II, signing a five year lease for space in a Puyallup shopping center owned by respondent Meridian Place, LLC. (FF 3, CP 556) While Callaway I was a success, "[t]he Callaway 2 lease had trouble from the start," (FF 6-7, CP 556-57) and by the November, 2008, Callaway II had shut its doors and Humcor had filed for bankruptcy. (FF 24, CP 559)

Haughney mischaracterizes the transaction at issue – the sale of Callaway I – as an "attempt to resolve Humcor's financial difficulties." (App. Br. 3) In fact, in January 2008, when Humcor was in default on a substantial portion of its Callaway II rent to Meridian, Haughney arranged for his friend John Loveall to "buy" the only valuable Humcor asset, Callaway I, for pennies on the dollar, in order to deprive Humcor's creditor Meridian of the means to collect on the substantial debt owed by Humcor to Meridian.

The parties set the sale price of Callaway I at $750,000, which indisputably represented Callaway I's fair market value, but most of the "consideration" paid by Loveall was illusory. (Op. 10-11, CP 164;

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[3] The trial court's original Findings of Fact and Conclusions of Law (CP 555-62) are cited as "FF" or "CL." Its Supplemental Findings of Fact and Conclusions of Law (CP 396-99) are cited as "SFF" or "SCL."

SFF 1, CP 397 (unchallenged)) Loveall paid $114,263.24 in cash, (FF 10, CP 557; CP 488), and purported to, but never did, assume a mortgage debt of over $635,000 on Haughney's personal residence. (FF 17, CP 558 ("the transfer of the Horizon Mortgage debt to Loveall was illusory"); CP 156-67) Loveall also had no involvement in the management of Callaway I, which at all times remained under Haughney's control. (FF 11-12, CP 557)

B. Haughney, Humcor's directors, Loveall and Cascade Bank all agreed that Humcor would transfer Callaway I to Loveall free and clear of Cascade Bank's security interest for its $325,000 loan, which Cascade Bank released for $117,500.

Prior to the sale of Callaway I to Loveall, Cascade Bank held a lien on all of Humcor's equipment at both Callaway I and at Callaway II to secure a loan balance of $325,000. Haughney was a personal guarantor of the Cascade Bank loan. (CP 514) In directing his lawyer to prepare the documents for the sale of Callaway I to Loveall, Haughney noted that "Cascade Bank will require a payment to release the UCC filing for the equipment. They will let us know what that amount is soon." (CP 487)

In the Purchase and Sale Agreement, Humcor agreed to convey to Loveall Callaway I's assets "free and clear of any and all liens," including Cascade Bank's security interest. (Tr. Ex. 1 at ¶4.4;

CP 478) Cascade Bank, at Haughney's request, agreed to take $117,500 in exchange for a release of is lien on the Callaway I equipment when it was transferred to Loveall. (CP 490, 515, 552)

Loveall paid Humcor $114,263.54 by check dated April 1, 2008. Humcor deposited the check on April 22, 2008, the same day upon which it paid Cascade Bank $117,500. (CP 488-89) Cascade Bank released its security interest on April 24, 2008. (CP 490)

C. The trial court found the transfer fraudulent. This Court reversed the trial court's limitation of Meridian's damages to $75,000, directing the trial court on remand to award damages based on the undisputed value of Callaway I, taking into account the value of the Cascade Bank lien.

The sale of Callaway I to Loveall was indisputably a fraudulent transfer. (CL 3, CP 560; CP 155-57) The transfer rendered Humcor insolvent (CL 3, CP 560), and deprived Meridian of the assets to allow Humcor to meet its obligations to Meridian under the Callaway II lease. (FF 16, CP 558)

In his 2011 Findings of Fact and Conclusions of Law, Pierce County Superior Court Judge John Hickman ("the trial court") found that the transfer of Callaway I to Loveall was a fraudulent transfer under RCW 19.40.041(b) because the sale was to an insider (Loveall), Humcor (through Haughney's continued management) retained control and continued to manage Callaway I following the sale, the

transfer consisted of substantially all of Humcor's assets, while Humcor was insolvent and threatened with suit by Meridian and occurred without notice to Humcor's creditors. (CL 4, CP 556) Haughney (who was also Humcor's accountant), Humcor's board of directors and Loveall all agreed that the value of Callaway I was $750,000. Nonetheless, the trial court arbitrarily limited Meridian's damages award to $75,000. (CL 7, CP 556-57; CP 163-65, 451)

Meridian appealed the damages assessment. Neither Haughney nor Humcor appealed the trial court's conclusion that the transfer to Loveall was a fraudulent conveyance.

This Court reversed the trial court's damages award as an abuse of discretion because it was without evidentiary support and contrary to the language of the UFTA. The Court held that the UFTA authorizes a creditor to recover damages "*for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.*" (Op. 9, CP 162 (emphasis in original), quoting RCW 19.40.081(c)) The statute defines asset to include "property of a debtor, but the term does not include [p]roperty to the extent it is encumbered by a valid lien." (Op. 9, *quoting* RCW 19.40.011(2)(i))

The Court held that given the parties' agreement that "the $750,000 sale price accurately reflected Callaway I's fair market value," (Op. 9, CP 162), the "trial court abused its discretion in awarding a tenth of the damages that the evidence at trial showed was compensable to Meridian under UFTA." (Op. 12, CP 165) The trial court's reduction had no evidentiary basis in the record because the value of the Cascade lien did not exceed $325,000. (Op. 11, n.12, CP 164) This Court remanded "for a hearing and recalculation of the damages" due Meridian from Haughney under RCW 19.40.081. (Op. 13, CP 166)

D. On remand, the trial court found the value of Callaway I to be $750,000 less $114,263.54 – the amount paid by the transferee to obtain title free and clear of Cascade Bank's lien.

The trial court conducted a hearing on remand on December 20, 2013, and issued an oral ruling finding that the amount of damages equaled the $750,000 agreed purchase price of Callaway I, less the $325,000 amount of the Cascade Bank lien prior to its discharge. (CP 365) Before the trial court could enter findings of fact or a judgment, Haughney filed for bankruptcy protection under Chapter 7. (CP 365) In September 2014, the bankruptcy court lifted its stay to permit Meridian to obtain a final judgment against Haughney for its damages in the trial court. (CP 327, 346-47, 365)

Following a hearing on November 21, 2014, the trial court reconsidered its 2013 oral ruling and issued a memorandum decision finding damages in the amount of "$750,000, less $114,263.54, representing payment of the Cascade Bank lien and further deduction of $75,000 for the net value amount already paid toward the [2011] judgment by the defendant, for a total of $560,000." (CP 367) The trial court found that the most "'equitable approach', as allowed by RCW 19.40, et al, is not to elevate 'form over substance' and to look at the real numbers that were used in releasing the lien, not the amount that existed at the time just before the transfer." (CP 367)

In Supplemental Findings of Fact and Conclusions of Law, the trial court found that the value of Callaway I was $750,000, "[b]ased on the uncontroverted testimony of the parties to the transfer in question and agreement by all parties in the case." (SFF 1, CP 397) The trial court found that Cascade Bank released its lien on the equipment at Callaway I "in consideration for the receipt of $117,500 from Humcor on April 22, 2008." (SFF 2, CP 397) The trial court found that Cascade Bank's lien "did not diminish the value of the asset transferred to Mr. Loveall" because the Bank released its lien "so that James Loveall would receive the equipment free and clear of

the Bank's lien and in fact the equipment was transferred to James Loveall free and clear of Cascade Bank's lien." (SFF 2, CP 397) The trial court entered judgment for $560,736.46, which it calculated based upon "the value of the asset transferred at the time of transfer of $750,000 less $75,000 already paid by Mr. Haughney to the plaintiff [in satisfaction of the 2011 judgment] and less $114,263.54 in cash paid by Loveall to Humcor as part of the purchase price." (SCL 1, CP 398; CP 401)

Haughney appeals. (CP 403)

IV. ARGUMENT

A. This Court, having previously interpreted the UFTA to grant the trial court equitable authority to adjust the value of Callaway I in light of Cascade Banks's lien, reviews the trial court's damages award and equitable determinations for abuse of discretion.

The issues raised by a fraudulent transfer claim "are primarily factual in nature." *Clayton v. Wilson*, 145 Wn. App. 86, 101, ¶ 29, 186 P.3d 348 (2008), *aff'd* 168 Wn.2d 57, 227 P.3d 278 (2009). *See Rainier Nat. Bank v. McCracken*, 26 Wn. App. 498, 506-07, 615 P.2d 469 (1980), *rev. denied*, 95 Wn.2d 1005 (1981). And, as recognized by the Court of Appeals, the UFTA gave the trial court discretion to adjust the value of Callaway I in light of the Cascade Bank lien. Haughney's argument that this Court's review of the trial court's legal conclusions is de novo (App. Br. 8) ignores the prior decision in this

case, which he has not challenged and is therefore controlling as the law of the case. *See* RAP 2.5(c); *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) ("once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.").

This Court reviews the trial court's damages award following a bench trial for abuse of discretion, (Op. 8, CP 161, *citing Krivanek v. Fibreboard Corp*, 72 Wn. App. 632, 636, 865 P.2d 527 (1993), *rev.* denied, 124 Wn.2d 1005 (1994)), reversing only where the award is "outside the range of relevant evidence, shocks the conscience, or results from passion or prejudice." (Op. 8-9, CP 161-62, *citing Mason v. Mortgage American, Inc.*, 114 Wn.2d 842, 950, 792 P.2d 142 (1990))

As this Court previously held, RCW 19.40.081(c) allows the court to adjust its damages award "as the equities may require," consistent with the UFTA's equitable purpose to prevent a debtor from placing property beyond the reach of creditors to the prejudice of their legal or equitable rights. *See Thompson v. Hanson*, 168 Wn.2d 738, 750, 239 P.3d 537 (2009); *Rainer Nat. Bank*, 26 Wn. App. at 505-06. This Court reviews the court's consideration of the

equities for abuse of discretion. *Arzola v. Name Intelligence, Inc.*, _ Wn. App. ___, ¶23, __ P.3d ___, 2015 WL 3971817 (2015).

B. The trial court followed the letter and purpose of the UFTA as established in this Court's prior decision in awarding to Meridian "the value of the asset transferred," and properly exercised its discretion in deducting only the amount paid to obtain clear title to Callaway I.

The trial court's damages determination is supported by this Court's mandate, the language of the UFTA, the undisputed evidence and is well within the trial court's discretion.

1. The trial court's damages award falls squarely within this Court's mandate, which remanded for the trial court to exercise its discretion to determine the value of the Callaway I asset.

In reversing the trial court's original judgment, this Court's mandate directed the trial court to determine the value of Callaway I, the asset that Haughney sought to transfer from Humcor to avoid Meridian's claim, in light of the substantial undisputed evidence that Callaway I was worth $750,000. Where, as here, the appellate court remands for further proceedings, the trial court is not bound to any particular result but instead may exercise discretion in entering a new judgment. *In re Marriage of Rockwell*, 157 Wn. App. 449, 454, 238 P.3d 1184 (2010) ("We intended that the trial court exercise its discretion on remand.").

This Court remanded "for a hearing and recalculation of the damages amount based on RCW 19.40.081 and the relevant evidence." (Op. 13, CP 166) The Court did not direct that "the full $321,706.04 should be deducted in computing Meridian's damages," as Haughney argues in quoting the Court's statement concerning "the amount of Cascade Bank's lien, roughly $325,000." (Op 11, CP 164; App. Br. 10)

This Court held "that the trial court had authority under RCW 19.40.011(2)(i) and 19.40.081(c) to adjust "the agreed $750,000 value of Callaway I" downward in light of Cascade Bank's lien on Callaway I," which Cascade Bank released when Haughney paid off the underlying loan with the sale proceeds. (Op. 11, CP 164) That is precisely what the trial court did on remand by determining the amount required to convey clear title to Loveall and awarding to Meridian the value of the asset that was fraudulently transferred. The trial court properly exercised its discretion to determine the value of the Callaway I asset that Haughney prevented Meridian from realizing in accordance with the mandate.

2. The UFTA authorizes the trial court to value an asset based on economic reality, not hypothetical or inflated values.

In authorizing a defrauded creditor to recover the value of an "asset transferred," RCW 19.40.081(c), the UFTA states that the court should not include "[p]roperty to the extent it is encumbered by a valid lien." RCW 19.40.011(2)(i). (*See* Op. 9, CP 162) Haughney argues that the trial court is obligated as a matter of law to ignore the economic realities of a transaction and disregard the amount actually paid to a lender to discharge its lien in order to convey clear title to the asset. (App. Br. 9) That argument is meritless.

By defining an "asset" taking into account "the extent it is encumbered by a valid lien," the UFTA directs courts to use the fair market value of the asset, considering the actual, not hypothetical value of any encumbrance. Haughney's argument that the court must ignore the "real numbers that were used in releasing the lien," (CP 367), flies in the face of the plain statutory language of RCW 19.40.011(2)(i).

The trial court properly refused to "elevate 'form over substance,'" rejecting Haughney's argument that it must consider the face value of a lien and not its freely negotiated true value in conveying clear title. (CP 367) Courts must look to the economic

reality of a transaction to further the purpose of the UFTA, which is to allow creditors to recover the value of property that is transferred by the debtor to avoid a valid obligation. *Thompson,* 168 Wn.2d at 750. Otherwise debtors could reduce the value of fraudulently transferred property to zero by artificially inflating the size of a lender's lien. Even when considering the potential, rather than the reality of a debtor's obligations, courts routinely discount the face amount of a security interest in valuing the debtor's assets. *See, e.g., In re SMTC Mfg. of Texas,* 421 B.R. 251, 286 (Bankr. W.D. Tex. 2009) ("Discounting a contingent liability by the probability of its occurrence is good economics and therefore good law, for solvency . . . is an economic term."), *quoting Covey v. Commercial Nat'l Bank of Peoria,* 960 F.2d 657, 660 (7th Cir. 1992).

Thus, while Cascade Bank, prior to release of its lien, "*could* look to that [Callaway I] collateral for satisfaction of its entire $325,000 claim," (App. Br. 9) (emphasis added), that is not what the Bank *in fact* did here. Cascade Bank released its security interest for only $117,500 in an arms-length transaction with its borrower Humcor, while maintaining its security interest in Callaway II's equipment. The trial court's damages award furthered the purpose of the UFTA by measuring the value that was lost to Meridian,

Humcor's largest creditor, through the fraudulent transfer orchestrated by its principal Haughney.

3. The trial court's damages award is supported by undisputed evidence that Meridian was deprived of an asset that was worth $750,000, less the amount paid to obtain title free and clear of Cascade Bank's lien.

The trial court had substantial, indeed, undisputed evidence that Loveall received free and clear title to the Callaway I asset that was worth $750,000 less the amount he actually paid to discharge Cascade Bank's lien. Haughney concedes that Loveall received the Callaway I asset free and clear of all liens, as contemplated in his memo from Haughney to his lawyer setting out the terms of the sale (CP 487), and the purchase and sale agreement with Humcor. (Tr. Ex. 1 at ¶4.4, CP 478; CP 552) Haughney also does not challenge the $750,000 value of Callaway I, except to the extent he questions the trial court's assessment of the value of Cascade Bank's lien.

Undisputed evidence supports the trial court's finding that "[t]he lien of Cascade Bank that had attached to the equipment at the Callaway I location prior to the transfer of that equipment to James Loveall was released by Cascade Bank in consideration for the receipt of $117,500 from Humcor on April 22, 2008." (SFF 2, CP 397) And that finding supports the trial court's conclusion that the face value

of the Cascade Bank lien "did not diminish the value of those assets to [Loveall] and, therefore should not be deducted from the value of the assets transferred to him." (SCL 2, CP 398)

Haughney negotiated a release of the Cascade Bank lien on the Callaway I equipment for $117,500, with the bank maintaining its lien on the equipment retained by Callaway II. (CP 515, 552) Loveall provided a $114,263.54 check dated April 1, 2008 that Humcor deposited on April 22, when Humcor paid $117,500 to Cascade Bank. (CP 488-89) On April 24, 2008, Cascade Bank confirmed that it had released its security interest upon the receipt of $117,500 from Humcor. (CP 490)

Haughney's contention that he obtained Callaway I subject to the face amount of Cascade Bank's lien because it was released in a "separate transaction," "not part of this single asset purchase transaction" (App. Br. 10), is frivolous. Haughney admitted in a 2010 declaration that "the cash realized from the sale of Callaway One was paid to Cascade Bank . . . . In exchange for the payment, Cascade Bank agreed to release its lien on the equipment located at Callaway One." (Tr. Ex. 9, ¶ 9; CP 552) Haughney's memo to his lawyer contemplated a release of the Cascade Bank lien as part of the purchase and sale agreement, which also required transfer to Loveall

"free and clear of all liens." (Tr. Ex. 1, ¶4.4; CP 478, 487) And Cascade Bank itself acknowledged that it considered its receipt of $117,500 not only "consideration for the sale" of Callaway I, but also "payment in full for the collateral covered by the sale," in order to provide to the purchasers "the assets free and clear of our perfected security interest." (CP 490)

No authority supports Haughney's argument that the release of Cascade Bank's lien was a "separate transaction" because it occurred three weeks after the date of the Purchase and Sale Agreement. Where, as here, the parties intend several instruments to be part of the same transaction, it does not matter that they were separately executed three weeks apart. *See Lemen v. Pring Corp.*, 4 Wn. App. 462, 466, 482 P.2d 802 (1971) ("Obviously both documents were part of the same transaction *even though they were executed approximately 3 weeks apart.*") (emphasis added); *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (construing 1965 condition sales agreement for sale of lots and 1969 contract with builder and subsequent performance bond "together as one contract, even though they do not refer to one another"), *rev. denied*, 86 Wn.2d 1004 (1975).

Rejecting Haughney's argument as elevating "form over substance" (CP 367), the trial court properly concluded that the "Cascade Bank lien was released from Callaway I's assets when they were transferred to James Loveall. . . ." (SCL 2, CP 398) This Court should affirm.

4. The trial court's "equitable approach" was expressly authorized by RCW 19.40.081(c) and its damages award was not an abuse of discretion.

The trial court applied "equitable factors" in considering the amount paid to discharge the Cascade Bank lien before arriving at its damages award. (SFF 3, CP 397-98) The trial court properly exercised its discretion in "taking the more 'equitable approach'" (CP 367) and deducting from the agreed value of the Callaway I asset the amount actually paid for Loveall to obtain title Callaway I free and clear of the Cascade Bank lien, rather than deducting the face value of the lien that no longer attached to the transferred assets. Its decision was consistent with RCW 19.40.081(c), which authorizes a judgment "for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require."

Thus, even if Haughney is correct that he obtained the Callaway I asset subject to the Cascade Bank security interest, the trial court had authority under RCW 19.40.081(c) to equitably adjust

its award to reflect the "real numbers" – the real economic value of the asset transferred to Loveall. Haughney fails to address this separate and independent basis for the trial court's judgment.

C. Meridian is entitled to its fees in responding to a frivolous appeal filed solely for the purpose of delay.

Haughney's appeal is frivolous, as it presents no debatable point of law and no chance for reversal. RAP 18.9(a); *See West v. Thurston County*, 169 Wn. App. 862, 868, 282 P.3d 1150 (2012), *rev. denied*, 176 Wn.2d 1012 (2013). Moreover, Haughney filed his appeal solely for purposes of delay, after making Meridian obtain an order from the bankruptcy court that his liability for a fraudulent conveyance was not dischargeable and then contesting the trial court's clear authority to establish the value of Callaway I under this Court's mandate. RAP 18.9(a); *See Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *rev. denied*, 94 Wn.2d 1014 (1980). This Court should award Meridian its attorney fees under RAP 18.9(a).

V. CONCLUSION

The trial court's damages award was authorized by the UFTA, by this Court's mandate and supported by undisputed evidence. This Court should affirm and award Meridian its fees.

Dated this 23rd day of September, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 23, 2015, I arranged for service of the foregoing Brief of Respondent to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd day of September, 2015.

Amanda K. Norman

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MERIDIAN PLACE, LLC, a Washington limited liability company, Appellant, v. JOHN AND JANE DOE HAUGHNEY, and their marital community; JAMES and KRISTI LOVEALL, and their marital community; Respondents, HUMCOR, INC., a Washington Corporation d/b/a Callaway Fitness; PAWNEE LEASING CORPORATION, a Colorado corporation; KEY EQUIPMENT FINANCE, INC., a Michigan corporation; CASCADE BANK, a Washington corporation; SMART LENDING, LLC; and MICHAEL PETROVIC, Defendants.	No. 42436-3-II UNPUBLISHED OPINION

HUNT, P.J. — Meridian Place, LLC appeals the trial court's low damages award against John Haughney under the Uniform Fraudulent Transfer Act (UFTA)[1] for Haughney's fraudulent transfer of a fitness gym to James Loveall; Meridian also appeals the trial court's refusal to enter judgment against Loveall for these damages. Meridian argues that (1) the damages award

[1] Chapter 19.40 RCW

amount was too low and did not reflect the fair market value of the asset, namely the gym, as testified and agreed to by the parties at trial; (2) UFTA authorized the trial court to enter judgment against Loveall because he was the first transferee; and (3) UFTA does not impose on the defrauded party a burden to prove the damages amount. We hold that the trial court abused its discretion in setting Meridian's damages substantially below the amount the relevant evidence supports but that the trial court did not abuse its discretion in refusing to enter judgment against Loveall. Accordingly, we affirm the trial court's decision not to enter judgment against Loveall. We vacate the amount of the trial court's damages award and remand for a new hearing and recalculation of damages.

FACTS

I. FRAUDULENT TRANSFER

A. Petrovic's Opening of Callaway Fitness I and II, Owned by Humcor; Financing

Michael Petrovic started Callaway Fitness (Callaway I); in 2006, he opened a second Callaway Fitness (Callaway II). Callaway I and II were owned by Humcor, Inc., of which Petrovic was a 42 percent shareholder. John Haughney, a certified public accountant, became a Humcor shareholder in January 2007. Petrovic entrusted Humcor's business operations to Haughney, deferring to him on most business decisions, including financing and payment of outstanding debt.

In June 2006, Humcor signed a lease with Meridian, to provide a new fitness location for Callaway II, effective in February 2007, when Callaway II began operating. The monthly rent was approximately $40,000, with an additional monthly recurring payment of approximately $10,000 for improvements that Meridian undertook to accommodate Callaway II's needs. VRP

(May 23, 2011) at 56, 60, 186. Humcor used Callaway I's income to subsidize the opening and operating costs of Callaway II; but before the end of the first month of Callaway II's operation, Humcor fell behind in the rent payments. Thereafter, during the first year and a half of Callaway II's operations, Humcor's payments to Meridian were "erratic, nonexistent, [and] unpredictable." 1 Verbatim Report of Proceedings (VRP) at 62.

In addition to his shareholder and business management involvement with Humcor, Haughney was also an investor in and the managing member of Smart Lending, LLC. Additional Smart Lending investors included Haughney's family members and James Loveall, Haughney's client and friend for 18 years and occasional golf partner.

Humcor obtained and personally guaranteed a $400,000 loan from Smart Lending. Haughney also mortgaged his personal residence for approximately $635,000, which he loaned to Humcor. At this point, Humcor owed $325,000 on a preexisting equipment loan through Cascade Bank, secured by Callaway I and Callaway II assets. Thus, after the infusion of new capital from Smart Lending, Humcor's liabilities totaled approximately $1,360,000. In addition, Meridian held a landlord-lien claim against Humcor's assets[2] for two months of rent, approximately $80,000. Humcor attempted to renegotiate Callaway II's lease without success.

B. Humcor's Sale of Callaway I to Loveall; Loveall's Sale to Petrovic

In April 2008, Humcor sold Callaway I to Loveall for $114,263.54 cash, plus Loveall's assumption of Humcor's $635,736.46 mortgage obligation on Haughney's personal residence; thus, Humcor appeared to realize a total of $750,000.00 from this sale. Humcor used the cash

[2] Cascade Bank's security interest in Callaway II's assets was in first position, followed by Meridian, and then Smart Lending.

proceeds to pay down its debt obligation to Cascade Bank, which in turn released its security interest in Callaway I's assets.[3] Humcor's balance sheets showed that Humcor transferred to Loveall approximately $550,000.00 of Callaway I's assets (office furniture and equipment).

At the time of this Callaway I sale, Humcor was insolvent and in default on a substantial portion of Callaway II's rent. Loveall's assumption of Humcor's mortgage did not help Humcor resolve its financial problems, in part because Loveall never formally assumed the mortgage debt and never made any payments on it. By November 2008, Humcor was in bankruptcy, and Callaway II ceased to exist. At this point, Loveall told Haughney that he wanted to sell his interest in Callaway I. In 2009, Petrovic purchased Callaway I from Loveall for $1, with Petrovic assuming Loveall's remaining mortgage obligation on Haughney's home; thus, Loveall appeared to realize a total of approximately $650,000 from this sale.

II. PROCEDURE

In July 2010, Meridian sued Humcor and Loveall under UFTA, alleging that Humcor's sale of Callaway I to Loveall had been fraudulent. Meridian sought (1) $3,049,227.48 in damages for Humcor's breach of Callaway II's lease; and (2) judgments against Humcor, Haughney, and Loveall or, alternatively, judgments against Humcor and Loveall jointly and severally, for any amounts Humcor owed Meridian. Meridian also sought to void the transfer of Callaway I to Loveall. The case proceeded to a bench trial.

At trial, Meridian, Loveall, and Haughney agreed that the $750,000 (the amount Loveall had paid to Humcor combined with the debt he had assumed in the transaction) accurately

[3] Cascade Bank retained its security interest in Callaway II's assets.

reflected the fair market value of Callaway I at the time of the sale. Nevertheless, Meridian argued that Loveall's assumption of Humcor's mortgage debt had been illusory and that the sale was made with intent to hinder, to delay, or to defraud Meridian. Agreeing with Meridian, the trial court found that the mortgage transfer to Loveall was illusory because (1) "[n]either Humcor nor Loveall believed that Loveall would be personally liable for that debt," and (2) the "transfer of Haughney's mortgage debt to one of [his] closest friends was not an arm's length transaction." Clerk's Papers (CP) at 340 (Findings of Fact (FF) 17).

Nevertheless, the trial court refused to enter judgment against Loveall. The trial court concluded that, even though Humcor and Loveall had both been responsible for the fraudulent transfer, "Loveall gained nothing from this sale. In fact, he lost $114,000-plus in the transaction. Therefore, there was no personal or economic gain he realized from the sale." 6 VRP at 759-60.

In setting the amount of Meridian's damages, however, the trial court concluded that (1) "[t]he lay testimony by the parties and the exhibits submitted did not support the position that Callaway [I] was worth $750,000 at the time of its sale to Loveall,"[4] (2) "*Meridian Place did not meet its burden of proof*" to establish the value of Callaway I,[5] and (3) Callaway I had a value of only $75,000, based on

> (a) the retail value of the equipment at the time of the transfer, taking into consideration that the equipment had a lien on it as well and (b) the Court's conclusion that at least $75,000 of the $114,000 paid by Loveall should have been made available for damages for breach of the lease.

[4] CP at 341 (FF 26).

[5] CP at 343 (Conclusion of Law 7) (emphasis added).

CP at 343 (Conclusion of Law 7). When Meridian asked how the trial court had determined Callaway I's $75,000 value, it replied:

> *The $75,000 was a figure that I devised based on what I felt* the actual retail equipment worth would have been for that gym equipment at the time of the transfer considering also that it had a lien on it as well, just to give you some idea. [. . .]
>
> Also, I want counsel to understand that *I felt that the true value of the transfer was probably* $114,000, which was the cash that was paid. *I believe* that at least $75,000 of that should have been made available for damages for the breach of the lease, and that's the other reasoning *why I came up with the $75,000* as well.

6 VRP at 761-62, 764 (emphasis added). Although Meridian informed the trial court that the lien had been paid down with the sale proceeds, the trial court did not adjust its damages ruling and instead entered a $75,000 judgment for Meridian against Haughney.

Meridian appeals the trial court's damages award and its refusal to enter judgment against Loveall.

ANALYSIS

I. UFTA AND BURDEN SHIFTING

We first address Meridian's threshold argument that the trial court erred in concluding that Meridian bore and failed to meet the burden to prove the value of the fraudulent transfer of Callaway I to Loveall.[6] Meridian is incorrect.

[6] Humcor is correct that Meridian failed to preserve this error by failing to object below to the trial court's improper placement of the burden of proof. But we have discretion to review this error by virtue of the RAP 2.5(a)'s use of the following permissive language: "The appellate court *may* refuse to review any claim of error which was not raised in the trial court." (Emphasis added). Here, we exercise our discretion to address the burden of proof because (1) this issue might otherwise arise again when we remand to the trial court to redetermine the damages amount in accordance with the UFTA; and (2) it will conserve judicial and the parties' resources to resolve the issue now.

The plain language of UFTA does not place on the defrauded party the burden of proving the *value* of the improperly transferred asset. Rather this UFTA language expressly places on the party alleging, and seeking to set aside, the fraudulent transfer the burden of proving that the debtor acted "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor" or transferred an asset "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation." RCW 19.40.041(a)(1), (2);[7] *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 528 (1994). Thus, because this burden of proof involves proving that the consideration for the transfer was grossly inadequate,[8] Meridian had to establish the property's value to the extent necessary to show that the consideration provided was inadequate.

Here, however, the parties *agreed* that $750,000 was the fair market value of Callaway I at the time of the transfer. The record contains sufficient evidence to support this value. Thus, we hold that the trial court erred in (1) ruling that Meridian failed to meet its burden to prove value, and (2) using this non-existent failure in setting the amount of Meridian's damages.

II. DAMAGES

Meridian's primary argument is that (1) the trial court erred in entering a judgment against Haughney for damages in the amount of only $75,000 where Washington's UFTA permits damages in the amount of the value of the asset transferred; and (2) for Callaway I at the

[7] Washington's UFTA, chapter 19.40 RCW, which regulates fraudulent transfers, provides that a fraudulent transfer occurs

> where one entity transfers an asset to another entity, with the effect of placing the asset out of the reach of a creditor, with either the intent to delay or hinder the creditor or with the effect of insolvency on the part of the transferring entity.

Thompson v. Hanson, 168 Wn.2d 736, 744, 239 P.3d 537 (2009).

[8] *Workman*, 50 Wn.2d at 189.

time of the transfer, the asset's value was 10 times that amount--$750,000, according to the testimonies of all parties. We agree.

A. Standard of Review

We review de novo a trial court's interpretation of a statute. *Dimension Funding, LLC v. D.K. Assocs., Inc.*, 146 Wn. App. 653, 657, 191 P.3d 923 (2008) (citing *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996)). We assume the legislature meant exactly what the statute says; if the statute is unambiguous, we will not engage in statutory interpretation. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). We review findings of fact to determine whether substantial evidence supports them, and whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). We review the trial court's conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

We review a trial court's award of damages for an abuse of discretion. *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 636, 865 P.2d 527 (1993). A trial court abuses its discretion when it exercises its discretion in a manner that is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretions when its decision is outside the range of acceptable choices given the facts and the applicable legal authority. *Snoqualmie Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 909-10, 273 P.3d 983 (2012) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). Generally, we will reverse a damages amount only if it is outside the range of relevant evidence, shocks the

conscience, or results from passion or prejudice. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). Such is the case here.

B. Value

UFTA provides the following method for calculating the damages that a creditor may recover:

> (b) [T]o the extent a transfer is voidable in an action by a creditor under RCW 19.40.071(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
> (1) The first transferee of the asset or the person for whose benefit the transfer was made;
> . . .
> (c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, *the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.*

RCW 19.40.081(b)(1), (c) (emphasis added). UFTA defines "asset" to include "property of a debtor, but the term does not include [p]roperty to the extent it is encumbered by a valid lien." RCW 19.40.011(2)(i).

C. Value of Callaway I at Transfer

Loveall testified that he believed the $750,000 he paid for Callaway I reflected its fair market value at the time of the sale. In arriving at this value, Loveall took into consideration Callaway I's equipment, its membership list, and the value of its ongoing operation. Loveall's counsel similarly stated, "We know that the value of this business was $750,000. . . . The only thing that [Meridian] has suggested to us is that the assumption of the debt was somehow illusory." 5 VRP at 727-28. Haughney agreed that the $750,000 sale price accurately reflected Callaway I's fair market value. Meridian repeatedly emphasized that it did not dispute Loveall's

and Humcor's valuation of Callaway and that $750,000 was the "negotiated price," "a fair value for the asset," "the worth of the asset transferred,"[9] and "the value that left Humcor."[10]

Notwithstanding the parties' uncontroverted agreement that the purchase price and value of Callaway I was $750,000 when Humcor sold it to Loveall, the trial court concluded that "[w]hat the parties agree [Callaway I] was worth was the least reliable evidence. Under the facts of this case, the assumption of the Haughney mortgage debt by Mr. Loveall was illusory.". 6 VRP at 759. The trial court did not explain, however, how Loveall's later failure to make Haughney's mortgage payments ("illusory" debt assumption) cast doubt on the validity of the agreed upon purchase price and the fair market value of the transferred asset at the time of the sale. Instead, the trial court appears to have "devised" its $75,000 "figure" based on (1) "what [it] felt the actual retail . . . worth would have been for that gym equipment at the time of the transfer," and (2) its "[feeling] that the true value of the transfer was probably $114,000, which was the cash that was paid . . . , at least $75,000 of [which] should have been made available for damages for the breach of the lease." 6 VRP at 761, 764.

The evidence produced at trial does not support the trial court's $75,000 figure. On the contrary, in addition to the parties' agreement about the $750,000 value, the record shows that Humcor received offers from two other fitness gyms, ranging from $200,000 to $300,000 for Callaway I's membership list alone. In addition, Humcor recorded the sale of Callaway I by adjusting its balance sheets downward by roughly $550,000 in a category marked "OFFICE

[9] 5 VRP at 687.

[10] 5 VRP at 691.

FURNITURE & EQUIPMENT";[11] transfer of these two assets alone totaled $650,000 to $750,000 in value. Moreover, neither the membership list value nor the furniture and equipment value reflect any value for Callaway I's ongoing operation, goodwill, or other intangibles, which arguably should have increased Callaway I's value above the $650,000 to $750,000 amounts.

We recognize that the trial court had authority under RCW 19.40.011(2)(i) and 19.40.081(c) to adjust the damages award downward in light of Cascade Bank's lien on Callaway I, which Cascade Bank released immediately after Humcor's sale of Callaway I to Loveall when Haughney paid off the underlying loan with the sale proceeds. Thus, the trial court properly considered Cascade Bank's lien in adjusting the damages award downward because UFTA does not treat encumbered property as an "[a]sset" of the fraudulent transferor (here, Haughney, as Humcor's principal shareholder). RCW 19.40.011(2)(i); *see also Thompson v. Hanson*, 142 Wn. App. 53, 66, 174 P.3d 120 (2007) ("Foreclosure, or sale of an asset for no net profit, means the asset was fully encumbered and therefore not an 'asset' for purposes of the UFTA"), *aff'd*, 168 Wn.2d 738, 239 P.3d 537 (2009). But, in lowering Callaway I's value by an amount that the record does not support, the trial court exceeded its UFTA statutory authority. A statutorily authorized downward adjustment of Meridian's damages in the amount of Cascade Bank's lien, roughly $325,000, would still have left Meridian with damages of roughly $425,000,[12] $350,000 more than the $75,000 that the trial court awarded.

[11] Ex. 5A, 5B.

[12] This figure represents the agreed value of the asset transferred, i.e., $750,000, less the value of the lien, $325,000.

Thus, despite the trial court's authority to adjust a damages award "as the equities may require" under RCW 19.40.081(c), here, the record does not show that "the equities [so] require"; nor did the trial court provide adequate justification for its significant departure from the values of the transferred asset and the lien, as supported by the evidence before it at trial. On the contrary, in support of its $75,000 damages award, the trial court provided only its own seemingly arbitrary "belief" that an asset's value cannot be proved by the parties' stipulation and its unsupported "feeling" that "at least $75,000 . . . should have been made available for damages for the breach of the lease." 6 VRP at 764.

We hold, therefore, that the trial court acted outside its statutory authority and thereby abused its discretion in awarding a tenth of the damages that the evidence at trial showed was compensable to Meridian under UFTA.

III. JOINT AND SEVERAL LIABILITY

Meridian next argues that the trial court erred in refusing to enter judgment against Loveall as a party jointly and severally liable with Haughney. We disagree.

UFTA provides that "[a] judgment *may* be entered against: (1) The first transferee of the asset *or the person for whose benefit the transfer was made.*" RCW 19.40.081(b) (emphasis added). Contrary to Meridian's assertion, UFTA's use of the term "may" is evidence that the trial court's decision to enter judgment against the first transferee, Loveall, is and was discretionary. *See Rudolph v. Empirical Research Sys.*, 107 Wn. App. 861, 865, 28 P.3d 813 (2001) (the words "will" and "shall" are mandatory, but words like "may" are permissive and discretionary).

Nevertheless, Meridian contends that the trial court erred in concluding that Loveall did not realize any personal or economic gain from the purchase of Callaway I and that he lost approximately $114,000 in the transaction; but Meridian fails to demonstrate how these factual determinations by the trial court are incorrect. CP at 340 (FF 20); Br. of Appellant at 33-34. Instead, Meridian argues that these factual determinations are "immaterial" and "afford[] no basis for exonerating Loveall." Br. of Appellant at 33-34. Meridian's argument fails: RCW 19.40.081(b) expressly authorizes the trial court to look beyond the parties' labels and to enter judgment against "the person for whose benefit the transfer was made," which it clearly did here when the trial court entered judgment against Haughney. RCW 19.40.081(b)(1).

We affirm the trial court's decision not to enter judgment against Loveall. We vacate the amount of trial court's damages award to Meridian and remand for a hearing and recalculation of the damages amount based on RCW 19.40.081 and the relevant evidence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, P.J.

We concur:

Penoyar, J.

Bjorgen, J.

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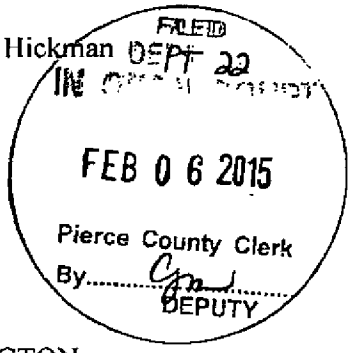
EMAIL ATTACHMENT FROM COA CLERK TO SUPERIOR COURT JUDGE (Here is the Mandate) This email attachment was only for court's file. Parties did not receive a copy of the email attachment.

The Honorable: John Hickman



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MERIDIAN PLACE, LLC, a Washington limited liability company, Plaintiff, vs. HUMCOR, INC., a Washington corporation, d/b/a Callaway Fitness, et al. Defendants.	No. 08-2-08784-6 **SUPPLEMENTAL AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND**

THIS MATTER is before the court upon remand from the Court of Appeals to determine the appropriate amount of damages in this case in light of and in pursuant to the directions provided by the Court of Appeals in its Mandate and associated Opinion dated August 20, 2013. The Court received briefing from the parties and heard argument on December 20, 2013, rendered oral findings and conclusions on that day, and considered further briefing and argument on November 21, 2014. On January 9, 2015, the Court issued and entered a Memorandum Decision on Plaintiff's Meridian Place, LLC, Damages wherein the Court made additional findings and conclusions and requested submission of findings and conclusions consistent therewith.

In accordance with the Court of Appeals' Mandate and Opinion and after considering the

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parties' submissions and arguments, the Court makes the following findings of fact and conclusions of law which supplement and amend the prior findings and conclusion entered on September 20, 2011 which incorporated oral findings read into the record on June 9, 2011 ("Prior Findings and Conclusions").

I. FINDINGS OF FACT

1. Based on the uncontroverted testimony of the parties to the transfer in question and agreement by all parties in the case, the value of the assets transferred at the time of transfer was $750,000. This value is also supported by other evidence as cited by the Court of Appeals including without limitation, a financial statement prepared by John Haughney's accounting firm stating that the value of Callaway I's office furniture and equipment alone was $550,000, and testimony that Callaway I's member list was worth between $200,000 and $300,000.

2. The lien of Cascade Bank that had attached to the equipment at the Callaway I location prior to the transfer of that equipment to James Loveall was released by Cascade Bank in consideration for the receipt of $117,500 from Humcor on April 22, 2008. Humcor used the $114,263.54 down payment it received from James Loveall on April 1, 2008 to pay Cascade Bank to release the lien on Callaway I equipment. Cascade Bank stated in writing that it released its lien on the Callaway I equipment so that James Loveall would receive the equipment free and clear of the Bank's lien and in fact the equipment was transferred to James Loveall free and clear of Cascade Bank's lien. Accordingly, the Cascade Bank lien did not diminish the value of the asset transferred to Mr. Loveall.

3. The amount of the judgment in this case was subject to some discretion and possible

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application of equitable factors and therefore could not be determined nor computed with exactness prior to trial.

II. CONCLUSIONS OF LAW

In accordance with the foregoing findings of fact, the Court makes these conclusions of law:

1. Judgment should be entered in favor of the plaintiff and against John Haughney and his marital community in the amount of $560,736.46 which is calculated by the value of the asset transferred at the time of the transfer of $750,000 less $75,000 already paid by Mr. Haughney to the plaintiff and less $114,263.54 in cash paid by Loveall to Humcor as part of the purchase price.

2. The Cascade Bank lien was released from Callaway I's assets when they were transferred to James Loveall, did not diminish the value of those assets to him and, therefore should not be deducted from the value of the assets transferred to him.

3. Prejudgment interest is not allowable and shall not be added to the amount of the judgment.

4. To the extent these findings and conclusions are inconsistent with the Prior Findings and Conclusions these findings and conclusions shall control but otherwise the Prior Findings and Conclusions on all issues remain in full force and effect.

DATED this 6 day of February, 2015.

FILED
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By..... DEPUTY

The Honorable John Hickman

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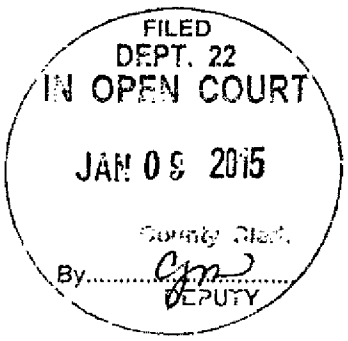

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

MERIDIAN PLACE LLC, Plaintiff, vs. HUMCOR INC, Defendant.	Cause No: 08-2-08784-6 MEMORANDUM / DECISION ON PLAINTIFF'S, MERIDIAN PLACE, LLC, DAMAGES

I. PROCEDURAL HISTORY

This case, between the above-listed parties, was tried before Department 22 on the 16th day of May, 2011. The Court found in favor of Meridian Place, LLC, and held that a fraudulent transfer did take place between defendants, John Haughney, and co-defendant, James Lovell, in the sale of a fitness gym known as, "Calloway I". The matter was subsequently appealed to Division II.

The Court of Appeals, Division II, upheld the trial court's finding of a fraudulent transfer between the two defendants, but remanded the case back to the trial court in order to revise its decision as to the value of the fitness gym at the time of the transfer. The appellate court finding that the value of the gym, at the time of the transfer, was the purchase price of $750,000.00.

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On the 20th of December, 2013, the Court, after hearing oral argument by all parties, the Court issued an oral opinion, based on the factors outlined by Division II, to the issue of the value of Calloway I at the time of the fraudulent transfer and the Court's need to subsequently revise any damage amount awarded to the plaintiff based on that recalculation.

Based on the directive from the Court of Appeals, the Court subsequently found the value of the fitness gym (i.e., Calloway I), to be $750,000.00 at the time of the sale between the two defendants. The Court of Appeals further indicated that the value could be subject to deductions based on any valid liens that existed at the time of the transfer. Specifically, the Court of Appeals mentioned a lien held by Cascade Bank in the amount of $325,000.00 which existed prior to the sale between the two defendants.

The Court, on December 20, 2013, in its oral ruling, allowed for the set off of the full $325,000.00, which represented the Cascade Bank lien, in addition to $75,000.00 payment that had already been made towards the original judgment the Court issued.

Before any written finding or judgment was made, pursuant to the December 20, 2013 decision, one or both of the defendants filed a bankruptcy action, in Federal Bankruptcy Court, and there were no further hearings until the 21st day of November, 2014. Pursuant to the review of a Bankruptcy Court transcript supplied by Plaintiff's counsel, the bankruptcy judge refused to issue an order as to the amount of the actual damages suffered by Meridian Place, LLC, and referred the matter back to the trial court in order to decide this specific issue. Subsequently, both the plaintiff and defendant filed motions for cross declaratory judgments on the issue of the amount, if any, of plaintiff's damages. The Court, on the 21st day of November, 2014, heard argument

to the mutual requests for declaratory judgments filed by both sides and this written decision is pursuant to their mutual requests for declaratory judgments in their respective favors.

II. ANALYSIS

The Court, in its oral decision in December of 2013, as to the valuation and amount of damages suffered by Plaintiff, focused on whether or not the Cascade Bank lien was a "valid lien". The issue of a valid lien was analyzed under the provisions of RCW 19.40.011 (2) (i) and 19.40.011 (8). The Court found, in its oral December ruling, that Cascade Bank was a valid lien and deducted the full $325,000.00 lien which existed at the time of the transfer of the gym assets between the two defendants. In addition, the Court deducted $75,000.00 from the value of the sales price of $750,000.00 to recognize the $75,000.00 payment that had been made by the defendants after the trial date. Counsel for Plaintiff, in its motion for declaratory judgment, argued that it would be inequitable to reduce the full amount of the Cascade Bank lien of $325,000.00 since Cascade Bank allowed, either prior to the closing or shortly thereafter, a reduction of their lien to $117,500.00 on the Calloway I gym equipment. Counsel for defense, in their declaratory judgment, indicated that no further monies were due and owing based on their "liquidated damages" theory of the case and that the $75,000.00, which had already been paid subsequent to the trial, represented the total damages suffered by the plaintiff. Further, defense counsel argued that the focus should be on the lien amount prior to the transfer and not to any subsequent reductions that were negotiated after the sale.

The Court finds that the sale agreement was executed on April 1, 2008. On that same date, a check was issued by Mr. Haughney to Humcor in the amount of $114,263.54. This check was then deposited in an account under Humcor's name at Cascade Bank on April 22, 2008. Cascade Bank subsequently released their $325,000.00 lien on Calloway I's gym equipment and Defendant Haughney took possession of the gym equipment free of any lien from Cascade Bank. The $325,000.00 was not paid to release the lien. It is clear, from the timing of these events, that Cascade Bank had negotiated for a lower lien payoff before closing of this sale.

Humcor's counsel argues that the appropriate approach is to determine damages on a "liquidation approach". Based on this formula, and the monies already paid by the defendant ($75,000.00), the plaintiff would be entitled to no further compensation.

This Court believes that the more "equitable approach", as allowed by RCW 19.40, et al, is not to elevate "form over substance", and to look at the real numbers that were used in releasing the lien, not the amount that existed at the time just before the transfer.

Therefore, the Court adopts the arguments submitted by Plaintiff's counsel, in his most recent briefing, and the Court revises its original decision to grant damages in the amount of $750,000.00, less $114,263.54, representing payment of the Cascade Bank lien and further deduction of $75,000.00 for the net value amount already paid towards the judgment by the defendant, for a total of $560,000.00. All other parts of the Court's

///

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/

decision, issued on December 20, 2013, shall remain in full force and effect. The Court directs plaintiff to draft findings of fact and conclusions of law consistent with this ruling.

DATED this 6th day of January, 2015.

JUDGE JOHN R. HICKMAN

1/9/15 Mailed copies to Attorneys Stehlik and Hanchett cpw

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Transmittal Letter

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Case Name: Meridian Place, LLC v. Humcor, Inc.
Court of Appeals Case Number: 47292-9

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Objection to Cost Bill

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